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SUPREME COURT, U.S.

80-1240

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

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MICHAEL P. LANE,

Petitioner,

v.

LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents,

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# RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, that:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .

Illinois Supreme Court Rule 402(a), Ill. Rev. Stat. ch. 110A, §402(a) (1970).

> Pleas of Guilty. In hearings on pleas of guilty, there must be substantial compliance with the following:
>
> > (a) Admonitions to Defendant. The Court shall not accept a plea of guilty without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:
> >
> > > (1) the nature of the charge;
> > > (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences;
> > > (3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made, or to plead guilty; and
> > > (4) that if he pleads guilty there will not be a trial of any kind, so that by pleading guilty he waives the right to a trial by jury and the right to be confronted with the witnesses against him.

## SUMMARY OF ARGUMENT

I. The decision of this Court in United States v. Timmreck, 441 U.S. 780 (1979) is inapplicable to the instant case in that Timmreck involved only a technical violation of Rule 11 of the Federal Rules of Criminal Procedure. In contrast, the respondents herein pleaded guilty pursuant to negotiated plea agreements, and were not informed, nor did they know, of the existence of mandatory parole terms. Thus, there is no conflict between the decision of this Court in Timmreck and the decision of the United States Court of Appeals for the Seventh Circuit in the instant case.

II. Neither the District Court nor the Court of Appeals erred in giving retroactive application to the decision in United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180 (7th Cir. 1977). The decision in Baker reaffirmed the long-standing principle that defendants must have a full understanding of the consequences of their pleas. Hence, it involved no new or unexpected rule of procedure. In addition, the integrity of the fact-finding process depends on the same full disclosure of all the consequences of a plea of guilty. Finally, balancing the purpose of the rule against the extent of reliance on the old rule together with the effect on the administration of justice, the scales tip in favor of retroactive application.

## ARGUMENT

### I.

### The Decision of This Court In United States v. Timmreck Is Inapplicable

In his petition for writ of certiorari, the petitioner argues that the decision of the United States Court of Appeals for the Seventh Circuit in the instant case is in direct conflict with the decision of this Court in United States v. Timmreck, 441 U.S. 780 (1979). There are, however, several important differences between United States v. Timmreck, supra, and the instant case which make the decision in Timmreck inapplicable and obviate any alleged conflict between the two decisions.

In Timmreck, the defendant pleaded guilty in the federal district court to a charge of conspiracy to distribute controlled substances. Addressing the defendant as required by the old Rule 11 of the Federal Rules of Criminal Procedure, the district court advised the defendant of the maximum penalty, 15 years imprisonment and a fine of $25,000, but failed to describe the mandatory special parole of at least three years. The district court accepted the guilty plea, and, at a later proceeding, sentenced the defendant to ten years imprisonment, a $5,000 fine, and a special parole term of five years. No objection was made and no appeal was taken from the judgment.

Two years later, the defendant moved to vacate the sentence pursuant to 28 U.S.C. §2255 on the ground that the trial court violated the terms of Rule 11. There was no contention by the defendant that he did not know of the

mandatory parole or that he would not have pleaded guilty had he known of the mandatory parole. Timmreck's only claim was a technical violation of Rule 11, which could have been raised by direct appeal since he became aware of the mandatory parole term at the time of sentencing and, therefore, at a time when he could have appealed.

Unlike defendant Timmreck, the respondents herein were unaware of the mandatory special parole term until well after they arrived at their designated institutions. Unlike Timmreck, they were not informed at sentencing that they were being sentenced to a mandatory parole term. This Court in Timmreck held only that a claim that could have been raised on direct appeal, should have been so raised. The principle of Timmreck, that collateral relief under 18 U.S.C. §2255 is not available "to do service for an appeal," simply does not apply to this case. Finally, there was no prejudice to defendant Timmreck from the failure to comply with the formal requirements of Rule 11. Timmreck was aware of the parole term at the time of sentencing. In the instant case, however, respondents were subjected to a substantially greater term than their actual sentence. Such an error is not a technical violation. but rather a violation of the constitutional right to due process.

Moreover, fundamental fairness demands that this Court uphold respondents' right to have the State live up to its bargains. Nothing in United States v. Timmreck, supra, indicates that there was any agreement in that case. United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180, 183 (7th Cir. 1977). Both respondents here, however, entered plea agreements. Respondent Lawrence

Williams agreed to plead guilty to a single charge of burglary in exchange for an indeterminate sentence of one to two years. At the trial court's request, the state's attorney recited the terms of the agreement in open court. The court elicited respondent Williams' understanding and acceptance of the terms of the agreement (L. Williams, R. 6, Ex. A, pp. 3-4), and ratified its terms (L. Williams, R. 6, Ex. A, p. 5). There was no mention by any person of the existence of a mandatory parole term. Yet, Williams received a sentence of from one to two years, followed by a three year parole term

Similarly, respondent Southall agreed to plead guilty under the terms of a plea agreement in exchange for an indeterminate sentence of from one to three years. The agreement was reached in the presence of the trial judge, who indicated he would so sentence respondent Southall (O. Southall, R.6., Ex. A, pp. 2, 5, 6). Again, the existence of a mandatory parole term was never mentioned. Yet, like Williams, Southall received a sentence of one to two years in prison, which he later learned would be followed by a three year parole term.

Petitioner suggests here that finality of judgments is more crucial to the integrity of our system of justice than notions of fundamental fairness in compelling the State to adhere to its agreements. That argument was properly rejected by both the District Court and a unanimous panel of the Court of Appeals. It is wholly consistent with this Court's decision in Timmreck, which held, quoting from Hill v. United States, 368 U.S. 424 (1962):

> We decide only that such collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule. [Emphasis added.] 368 U.S. at 429.

Petitioner does not, and cannot, suggest that all that is involved in the instant case are "mere technical violations." Thus, United States v. Timmreck, supra, rests on a "wholly different" factual basis, as the Court of Appeals found, and has no application to the instant case.

## II.

### The Court of Appeals Did Not Err In Applying The Decision In United States ex rel. Baker v. Finkbeiner Retroactively

In United States ex rel. Baker v. Finkbeiner, 551 F. 2d 180 (7th Cir. 1977), the Court of Appeals for the Seventh Circuit held that failure to advise a state criminal defendant that a mandatory parole term automatically attached to his sentence violated the due process clause of the Fourteenth Amendment, and rendered his guilty plea involuntary. In Baker, the petitioner agreed to plead guilty to criminal charges in accordance with a plea agreement negotiated by petitioner's attorney and the state's attorney, and ratified by the trial judge. Before accepting the plea, the trial judge informed the defendant of the statutory range of penalties on the pending charges and told him that his sentence would conform to the plea agreement. The judge failed to mention any mandatory parole period. Neither the prosecutor nor defendant's attorney remedied this omission.

Defendant was imprisoned, served his sentence, and was released on parole. After violating parole, he was imprisoned for an additional term in excess of his original sentence. The Court held that since the defendant was

given a substantially more onerous sentence than the one for which he had bargained, his guilty plea had been unfairly induced. The full consequences of his plea had not been made clear. The court did not, however, vacate the guilty plea since vacating the plea would have permitted the State to reprosecute the defendant who had already performed his part of the bargain by serving his original sentence exclusive of mandatory parole. Instead, the court ordered the petitioner released, extinguishing his undisclosed parole obligation.

Petitioner contends that the Baker doctrine should not be applied retroactively, arguing:

(1) Baker set forth a new and unexpected rule of procedure and is therefore not entitled to retroactive application;

(2) Only procedures which affect the integrity of the fact-finding process should be applied retroactively;

(3) Under other case law establishing a balancing test, Baker ought not to be retroactively applied.

Respondents submit that none of these arguments is valid.

First, the Baker decision did not enunciate a new rule of constitutional law. The principle that a defendant should possess a "full understanding of the consequences of a guilty plea" was first enunciated more than fifty years ago in Kercheval v. United States, 274 U.S. 220, 223 (1927). This principle was reiterated in Boykin v. Alabama, 395 U.S. 238 (1969), and Santobello v. New York, 404 U.S. 257 (1971). In Boykin, this Court held that where there is a guilty plea in a state criminal trial, "what is at stake . . . demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure

he has a full understanding of what the plea connotes and its consequences." 395 U.S. 238, 243-244. Boykin predates the first guilty plea in the instant case by nearly four years.

In Santobello, recognition of a prosecutor's duty concerning promises made in negotiating guilty pleas was held to require specific performance of a plea bargain or leave to withdraw a plea of guilty:

> When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be a part of the inducement or consideration, such promise must be fulfilled. 404 U.S. 257 at 263.

Santobello also predates all of the guilty pleas herein.

Baker was thus not unexpected. Baker, relying on Boykin and Santobello, merely "represents the application of existing precedent to particular and somewhat different facts." United States ex rel. Williams v. Morris, 447 F. Supp. 95, 106 (N.D. Ill. 1978).

> Retroactivity questions are presented only where a decision establishes a new principle of law, . . . either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. United States ex rel. Williams v. Morris, 447 F. Supp. 95, 105, quoting Chevron Oil Co. v. Huson, 404 U.S. 97, 106 (1971).

Even assuming, arguendo, that Baker established a new rule of procedure, full retroactivity, as a threshold matter, is available where the new rule remedies a significant or substantial defect in the fact-finding process at trial, raising serious questions about the accuracy of guilty verdicts or where the new rule accords constitutional immunity to conduct which was previously penalized. Petitioner, however, incorrectly asserts that failure to admonish as to

mandatory parole bears no relationship to the integrity of the fact-finding process of a criminal trial. Rather, less than full disclosure of the consequences of a guilty plea may make the difference between a bargained-for guilty plea and a trial.

> A defendant with a colorable defense to the charge made against him may evaluate a guilty plea differently if he faces a straight one year sentence rather than one year plus three years of mandatory parole. His decision to forego trial may be affected and the outcome of that bypassed trial might have been favorable to him. United States ex rel. Williams v. Morris, 447 F. Supp. 95, 106.

There can be no greater defect in the fact-finding process at trial than that it took place because of an improperly induced plea of guilty. If that plea is entered without disclosure of a material factor detrimental to the party pleading guilty, there is serious doubt as to its accuracy.

Petitioner's argument against retroactivity goes one step further. If Baker is (1) a new rule of procedure and (2) not related in any manner to the integrity of the fact-finding process, then the applicable test for determining retroactivity is a balancing process. Assuming, arguendo, that petitioner is correct, Baker should nevertheless be applied retroactively. Three factors are generally looked to: (1) the purpose of the new rule; (2) the extent of reliance upon the old rule; and (3) the effect retroactive application would have upon the administration of justice. Stovall v. Denno, 388 U.S. 293, 297 (1967).

The purpose of the rule in Baker is twofold: (1) it assures that a defendant entering a guilty plea has a full understanding of the consequences of his decision, Boykin v. Alabama, 395 U.S. 238 (1969); and (2) it assures

fundamental fairness in the plea bargaining process by compelling the State to keep its promises, Santobello v. New York, 404 U.S. 257 (1971). Both purposes are significant. The integrity of the fact-finding process rests on the premise that all parties have a full understanding of the consequences of their acts. Second, an agreement to enter a plea of guilty and waive the panoply of rights attendant to an accusation of criminal deeds must bear consideration from the charging party, the State. If the State is allowed subsequently to change the terms of its commitment at will, the consideration fails. The original terms of the agreement must be enforced, and can only be enforced by retroactive application of the Baker decision.

Respondents submit that the purposes of Baker clearly favor retroactivity and that there is no need to examine the remaining two factors. Assuming, arguendo, that such an examination is necessary, those factors also weigh in favor of retroactive application. Petitioner submits that Illinois courts have relied extensively on Illinois Supreme Court Rule 402 prior to the decision in People v. Wills, 61 Ill. 2d 105 (1975). Petitioner further submits there was no reason to expect a decision which would require that a defendant be fully advised of all the consequences of his plea. This contention is belied by the decision in Boykin v. Alabama, 395 U.S. 238 (1969), decided a full six years prior to People v. Wills, by the decision of the Illinois Supreme Court in People v. Washington, 38 Ill. 2d 446 (1967) (a plea of guilty induced by unfulfilled promises loses its voluntary nature), and by the decision of this Court four years later in Santobello v. New York, 404 U.S. 257 (1971).

Finally, petitioner's in terrorem argument that retroactive application of Baker will have a devastating effect on the administration of justice is groundless. The District Court met this problem, United States ex rel. Williams v. Morris, 447 F. Supp. 95, 107-108 (N.D. Ill. 1978). That resolution was adopted by the Court of Appeals, United States ex rel. Williams v. Morris, 633 F. 2d 71, 77 (7th Cir. 1980). Both courts rejected petitioner's argument. Significantly, these courts, particularly the District Court, would bear much of the brunt of the alleged onslaught of litigation. In fact, a class action is now pending before the District Court in United States ex rel. Chester Flowers v. Illinois Parole & Pardon Board, 78 C 1000. Both courts correctly held that the constitutionally invalid portion of the sentence could be isolated and excised without requiring the State to begin the fact-finding process anew, quoting Robinson v. Neil, 409 U.S. 505, 509-510. The decision of the Court of Appeals should be affirmed.

## CONCLUSION

For the foregoing reasons, respondents pray that this Court deny the Petition for Writ of Certiorari herein.

Respectfully submitted,

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Attorneys for Respondents

Of Counsel:

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## CERTIFICATE OF SERVICE

I certify that I have personally had this day mailed, by first class mail, postage prepaid, from a United States mail depository located at One IBM Plaza, Chicago, Illinois, a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to:

Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601

Sue Anne Herrmann

Dated: April 16, 1981

Subscribed and sworn to before me
this 16th day of April, 1981.

Notary Public

No. 80-1240

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GAYLE FRANZEN,

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LAWRENCE WILLIAMS and OSCAR SOUTHALL,

Respondents.

MOTION FOR LEAVE TO FILE
IN FORMA PAUPERIS

Respondents, Lawrence Williams and Oscar Southall, ask leave to file their response to the Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46 (1) of the Rules of the Supreme Court of the United States.

In support thereof, respondents state that respondents sought leave to file in forma pauperis in the United States District Court for the Northern District of Illinois, and in the United States Court of Appeals for the Seventh Circuit under the Criminal Justice Act of 1964, as amended. Such leave was granted by both courts, and Martha A. Mills was appointed by both courts to act as counsel for respondents.

Respectfully submitted,

Martha A. Mills

Martha A. Mills
Attorney for Respondents

Of Counsel:

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## CERTIFICATE OF SERVICE

I certify that I have personally had this day mailed, by first class mail, postage prepaid, from a United States mail depository located at One IBM Plaza, Chicago, Illinois, a copy of the foregoing Response to Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to:

Michael B. Weinstein
Assistant Attorney General
188 W. Randolph Street
Suite 2200
Chicago, Illinois 60601

Sue Anne Herrmann

Dated: April 16, 1981

Subscribed and sworn to before me
this 16th day of April, 1981.

Notary Public